UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHALIMAR N. ROMAN-GILBERT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-89-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises questions concerning the commissioner's treatment of evidence of mental impairment. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had impairments of anxiety disorder, attention deficit hyperactivity disorder ("ADHD"), back pain and possible carpal tunnel syndrome

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1381(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

(beginning March 1, 2002), impairments that were severe but which did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, Record at 18; that her allegations regarding her limitations were not entirely credible because they were not supported by objective medical evidence, were internally inconsistent and were inconsistent with the objective medical evidence and her activities of daily living, Finding 5, *id*.; that she retained the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently, to stand and walk for 6 hours in an 8-hour work day and to sit for 6 hours in an 8-hour work day with the ability to change position as needed, to understand, remember and carry out simple instructions and to interact appropriately with small numbers of coworkers and supervisors, to respond appropriately to routine changes in the work setting, but she must avoid more than incidental contact with the general public and, after March 1, 2002, repetitive fine fingering, Finding 7, *id*.; that she retained the residual functional capacity for light work, *id*.; that she was precluded by her impairments from returning to her past relevant work, Finding 8, *id*.; that given her age (younger individual), education (high school equivalent) and semi-skilled work history with no transferable skills, use of Rule 202.21 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework resulted in the conclusion that the plaintiff was able to perform work that existed in significant numbers in the national economy, Findings 9-10, *id*. at 18-19; and that she, therefore, was not disabled, as that term is defined in the Social Security Act, at any time from April 13, 2000 through the date of the decision, *id*. at 19. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622. 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence, 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of*

Health & Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

A. Mental RFC

The plaintiff first challenges the administrative law judge's evaluation of the limitations on her residual functional capacity ("RFC") imposed by her mental impairments as unsupported by the evidence. Plaintiff's Itemized Statement of Errors ("Itemized Statement") (Docket No. 4) at 4-5. Specifically, the following findings are the object of this challenge:

> She is able to understand, remember, and carry out simple instructions, and to interact appropriately with small numbers of coworkers and supervisors, but must avoid more than incidental contact with the general public. She is capable of responding appropriately to routine changes in the work setting.

Finding 7, Record at 18. The administrative law judge stated that "[t]his assessment is consistent with the objective medical evidence provided by the claimant's treating and examining sources and with the assessment of the state medical examiner (Exhibit 4F) . . . ." Record at 15. In fact, the finding is taken

almost word-for-word from the state examiner's report cited by the administrative law judge. Record at 215. The finding is also consistent with other evidence in the record. *E.g.*, *id*. at 229, 232.[2] The plaintiff does not identify any medical evidence with which she contends that this finding is inconsistent other than the report of Lydia Ward, Psy.D., *id*. at 297-304, which was completed and submitted after the hearing, *id*. at 22, 297. She asserts that Dr. Ward's statement that "she may be left feeling quite frustrated and overwhelmed quite a good bit of the time," *id*. at 302, "translates directly into the limitations described in item no. 11 on the mental RFC form and supports a limitation at a marked level," Itemized Statement at 5. Because such a marked limitation was not incorporated into the hypothetical question posed to the vocational expert,[3] she contends she is entitled to remand. *Id*.

Item 11 on the Mental Residual Functional Capacity Assessment form asks the reviewer to indicate whether the claimant's "ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods" is "not significantly limited," "moderately limited," or "markedly limited." Record at 231. It is far from clear that the statement of Dr. Ward on which the plaintiff relies "translates directly" into a response of "markedly limited" to item 11 on the assessment form. Certainly, the plaintiff's counsel is not qualified to make that judgment. Particularly in a case such as this, where the administrative law judge discussed and rejected Dr. Ward's conclusions for reasons that are adequately supported by substantial evidence, Record at 15-16, this argument cannot provide the basis for remand.

[2] The plaintiff complains that the administrative law judge does not mention this state-agency assessment, Itemized Statement at 5, but since the assessment is consistent with the administrative law judge's findings, her failure to cite the state-agency report cannot be considered an error.

[3] Of course, a limitation found only in a report submitted to the administrative law judge after the hearing could not have been included in a hypothetical question posed during the hearing.

The plaintiff also contends that the assessments of the state-agency reviewers, which support the administrative law judge's findings concerning psychological limitations, must be completely disregarded because they were performed "almost a year prior to hearing" and "without the benefit of Dr. Ward's evaluation." Itemized Statement at 5. At oral argument, counsel for the plaintiff was unable to cite any authority in support of this argument. It is an unfortunate fact that, given the nature of the Social Security application process and the delays inherent therein, most if not all state-agency evaluations will be performed months before a hearing is held before an administrative law judge. That fact, standing alone, cannot serve to require an administrative law judge to disregard any state-agency evaluations performed more than some arbitrary number of days before the hearing. Similarly, the fact that the report of a consulting or treating medical provider is submitted after the hearing cannot mean that any state-agency evaluations submitted before the hearing must automatically be ignored. If the new report is inconsistent with the conclusions of the state-agency reviewers, and if the administrative law judge finds the conclusions in the new report to be supported by medical signs and symptoms as well as laboratory findings, the administrative law judge may, in the performance of his or her function, decide to adopt the conclusions of the new report. If conflicting evidence on these points is present in the record and supports the findings of the state-agency reviewers, however, the administrative law judge may also choose to credit those conclusions instead, as is the case here. *See, e.g.*, 20 C.F.R. §§ 404.1527(d)(4) & (f)(2)(i), 416.927(d)(4) & (f)(2)(i); *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988) (treating physician's conclusions may be rejected, especially when contradictory medical evidence appears in record). The time at which the conclusions were drawn is only one of many factors to be considered by the administrative law judge. It is not the only factor.

B. Need to Contact Dr. Ward

The plaintiff relies on 20 C.F.R. § 404.1512(e) to support her contention that the administrative law judge committed reversible error by failing to contact Dr. Ward about her findings with respect to ADHD. Itemized Statement at 6. That regulation provides:

> When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision. To obtain the information, we will take the following actions.
>
> (1) We will first recontact your treating physician or psychologist or other medical source to determine whether the additional information we need is readily available. We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. . . .

20 C.F.R. § 404.1512(e). Assuming, despite the evidence in Dr. Ward's report to the contrary,[4] that Dr. Ward can be considered a treating medical source, counsel for the plaintiff was unable to explain at oral argument how the information provided in Dr. Ward's report was inadequate for the administrative law judge to reach a determination that she was disabled as a result of ADHD. In the absence of that explanation, it is impossible to conclude that the duty imposed by section 404.1512(e) was triggered. Dr. Ward's report, in which she diagnoses ADHD, combined type dysthymia and panic disorder with agoraphobia, cannot reasonably be read to present the conclusion that the ADHD alone is disabling. Record at 297-304. In addition, as I have already noted, other medical source evidence in the record is sufficient to allow the administrative law judge to conclude that the plaintiff was not disabled. Nothing in Social Security Ruling 96-5p, cited in passing by the plaintiff in connection with this argument, Itemized

[4] Dr. Ward's report indicates that the plaintiff was referred to Dr. Ward only for evaluation, not for treatment. Record at 297.

Statement at 6, requires a different outcome. *See also White v. Barnhart*, 287 F.3d 903, 908-09 (10th Cir. 2002) (rejection of treating physician's opinion does not trigger duty to recontact; administrative law judge must find information received from treating physician to be inadequate for consideration); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (disagreement with treating source's conclusion not equivalent of finding that evidence from that source was inadequate).

If the plaintiff means by this argument to suggest that Dr. Ward's report must be deemed to override any inconsistent medical evidence because she was a treating psychologist, Dr. Ward's report does not qualify for controlling weight under the applicable regulations, 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

Medical Expert

Finally, the plaintiff contends that the administrative law judge was required to use the services of a medical expert at the hearing because she was "incapable of analyzing the mental health evidence to determine the Claimant's mental health residual functional capacity." Itemized Statement at 6. The only authority cited by the plaintiff in support of this argument, *Manso-Pizarro*, only requires that the administrative law judge obtain evaluation by an expert of raw medical data that does not lend itself to ready understanding by a lay person, 76 F.3d at 17-18. In this case, such evaluation was performed by the state-agency reviewers, as well as the medical sources whose reports are in evidence. On the specific claim presented by the plaintiff — that the administrative law judge was required to have a medical expert testify at the hearing — the First Circuit has held that "[u]se of a medical advisor in appropriate cases is a matter left to the [Commissioner's] discretion; nothing in the Act or regulations requires it." *Rodriguez Pagan v.*

Secretary of Health & Human Servs., 819 F.2d 1, 5 (1st Cir. 1987). The plaintiff is not entitled to remand on this basis.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of December 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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V.

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